90-1011

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1990

THOMAS EDWARD NEVIS, Petitioner,

v.

UNITED STATES OF AMERICA, Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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QUESTION PRESENTED FOR REVIEW

Is a trial judge's determination, made previously in accepting a witness's guilty plea, that the plea was made voluntarily and is otherwise valid, binding on a criminal defendant at a subsequent trial when the witness testifies against the defendant, and when the offense to which the witness pled guilty is the very offense at issue at the trial?

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NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1990

THOMAS EDWARD NEVIS, Petitioner,

v.

UNITED STATES OF AMERICA, Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Petitioner Thomas Edward Nevis prays that a writ of certiorari issue to review the opinion and judgment of the United States Court of Appeals for the Ninth Circuit entered on August 21, 1990, which affirmed the order of the United States District Court for the District of Oregon.

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OPINION BELOW

The opinion of the Court of Appeals is not officially reported. It is attached as Appendix A, infra. The petition for rehearing and suggestion for rehearing en banc was denied October 19, 1990 (see Appendix B, infra).

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254.

CONSTITUTIONAL PROVISIONS

The Sixth Amendment to the United States Constitution provides in part: "In all criminal prosecutions, the accused shall enjoy the right. . .to be confronted with the witnesses against him. . . ."

STATEMENT OF THE CASE

Petitioner was the recipient of loans from State Federal Savings and

Loan Association (State Federal), a Corvallis, Oregon, savings and loan institution. He was convicted on twenty-four counts of conspiracy (18 U.S.C.§ 371), bank fraud (18 U.S.C. § 1344), and other substantive offenses (18 U.S.C. §§ 657, 1006, 1014, and 1343) based on his receipt of these loans.

The main theory of the prosecution was that Petitioner and co-conspirators sought to evade a banking regulation limiting the amount of money that can be lent to one person by a federally insured bank. The regulation, known as the loan-to-one-borrower regulation, is codified at 12 C.F.R. § 563.9-3. The offenses for which Petitioner was convicted were based on efforts to circumvent the regulation.

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Petitioner's defense was that he lacked criminal intent and relied on officers of the bank to structure the loans in compliance with the loan-to-one-borrower regulation.

At trial, three witnesses testified against Petitioner pursuant to plea agreements with the government. Mr. Franks had previously pled guilty to Count 32 of the indictment, which charged him, Petitioner, and others with defrauding State Federal. 18 U.S.C. § 1344. Messrs. Koos and Campbell had pled guilty to providing false statements to State Federal. 18 U.S.C. § 1014. All three witnesses were alleged co-conspirators of Petitioner.

These witnesses received substantial benefits in exchange for their cooperation and testimony. These

benefits included dismissal of numerous counts of the indictment (Franks and Koos), dismissal of charges against a spouse (Franks), and resolution of federal bank fraud investigations in other judicial districts (Franks and Campbell).

The fact that these witnesses had pled guilty as accomplices to the very criminal conduct with which Petitioner was charged was extremely damaging to his case. Such evidence tended to establish the existence of a conspiracy and scheme to defraud, as well as Petitioner's association with those involved in it.

Petitioner therefore attempted to show through cross-examination that the cooperating witnesses may not in fact have been guilty of the banking crimes

to which they pled guilty. Petitioner sought to demonstrate that these witnesses pled guilty largely as a result of their misunderstanding of the criminal ramifications of the loan-to-one-borrower regulation and also for reasons of "damage control." (See discussion below.)

Mr. Franks pled guilty to bank fraud, 18 U.S.C. § 1344. Yet he testified on cross-examination that he did not intend to defraud State Federal. RT 636-37. Specific intent to deceive is an element of bank fraud under 18 U.S.C. § 1344. United States v. Bonallo, 858 F.2d 1427, 1433 (9th Cir. 1988). Mr. Franks testified that he pled guilty because he thought he had violated the loan-to-one-borrower regulation. He erroneously believed

that a violation of the regulation itself constituted a crime. It does not. See United States v. Wolf, 820 F.2d 1499, 1505 (9th Cir. 1987), cert. denied, 485 U.S. 960 (1988). After defense counsel informed Mr. Franks on cross-examination that a violation of this regulation was itself not a criminal offense, Mr. Franks stated, "Well, I feel maybe I shouldn't be here." RT 633.

On the re-cross-examination of Mr. Franks, the trial court prohibited any further questioning by defense counsel suggesting that Mr. Franks was not actually guilty. Regarding Mr. Franks' guilty plea, the court stated (in the presence of the jury), "I took the plea. It was a valid plea, and that's the end of that." RT 655. The

trial judge ruled further that he would not allow any suggestion either during cross-examination or in closing argument that a guilty plea was improper or that any person who pled guilty was not guilty when he entered that plea. RT 675.

Another cooperating witness, Mr. Koos, testified that the conduct giving rise to his guilty plea was actually done as an attempt to comply with the banking regulation, strongly suggesting that he lacked the requisite criminal intent. Mr. Koos was a lawyer for the bank and was facing numerous charges, including perjury. These were dismissed pursuant to his plea agreement. He testified that his decision to plead guilty was based on "balancing the risk." RT 264.

The Court of Appeals upheld the trial court's ruling, holding that the question of the "validity" of the guilty pleas was a legal one, not open to question on cross-examination. Opinion, infra, at App. A, A-13.

REASONS FOR GRANTING THE WRIT

1. Conflict with other Circuits.

The opinion below conflicts with the opinions of two Courts of Appeals, both of which recognize that a trial judge's prior determinations in accepting a witness's guilty plea must yield to a defendant's sixth amendment right to confront and cross-examine those witnesses at his own trial.

In United States v. Mayer, 556 F.2d 245, 251 (5th Cir. 1977), the court stated:

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> A judge's determination, made for purposes of accepting an individual's guilty plea, that the plea was entered voluntarily and without any expectation of leniency, does not have collateral estoppel effect at a subsequent criminal proceeding at which the individual testifies against an accomplice. . . and his motivation for so testifying is in issue.

556 F.2d at 251 (emphasis supplied).

On this question, Mayer and the instant case are factually indistinguishable. In Mayer, the trial judge had previously accepted the guilty pleas of individuals who later testified against the defendant at trial. Because he had accepted those pleas, the judge erroneously removed from the jury the question of whether the guilty pleas were motivated by a desire to please the prosecution in hope of receiving a light

sentence in return. Id. The trial judge removed the same question from the jury in this case. Petitioner should have been permitted to cross-examine and argue the question whether cooperating witnesses pled guilty not because they were guilty but because they wanted to "balance the risk."

The opinion below also conflicts with United States v. Marion, 477 F.2d 330 (6th Cir. 1973), upon which the Mayer court relied. In that case the trial judge informed the jury that he had accepted the guilty plea of a cooperating witness and would not have done so had he not been satisfied that the witness was truthful in stating that his plea was given voluntarily. The trial judge's statement was held to

constitute reversible error because it deprived the defendants of the right to have that witness's credibility determined by the jury. 477 F.2d at 332.

In the instant case, the trial judge instructed the jury that he had accepted Mr. Franks' guilty plea and that it was a "valid" plea. This should not have prevented Petitioner from attacking the plea on the separate question of whether it was the result of confusion about the law or an overwhelming desire to avail oneself of the benefits of a plea agreement.

Mayer and Marion stand for the proposition that, whatever may be a judge's conclusions concerning a guilty plea, those conclusions are not binding

on a defendant in a subsequent trial. This includes the trial judge's previous determination that the witness was in fact guilty of the crime to which he pled guilty. When that crime turns out to be the very crime at issue in a later trial, the defendant must be allowed to inquire about all factors affecting the witness's motivation to cooperate and testify. Delaware v. Van Arsdall, 475 U.S. 673, 678-79, 106 S.Ct. 1431, 89 L.Ed.2d 674 (1986). This necessarily includes questioning whether the witness may have pled guilty for reasons unrelated to actual guilt.

The Ninth Circuit decision in this case conflicts with Mayer and Marion. Accordingly, this Court should grant the writ.

2. Conflict with Opinion of this Court.

The Ninth Circuit below held that the validity of previous guilty pleas was a "legal" question, not subject to question by a defendant at his trial. In essence, the judge's previous determination that the guilty plea was sufficient under Rule 11, Fed. R. Crim. P., binds a criminal defendant who seeks to cross-examine the witness as to his motivation for pleading guilty at a later trial.

Petitioner submits that this decision cannot be reconciled with Crane v. Kentucky, 476 U.S. 683, 106 S.Ct. 2142, 90 L.Ed. 2d 636 (1986). In that case the defendant attempted to demonstrate at trial that the

circumstances of his confession tended to cast doubt on its credibility. In a pretrial proceeding, the trial court had previously determined that, legally, the confession was voluntarily given. On the basis of this legal finding of voluntariness, the trial court refused to allow the defendant to offer evidence at trial to show that the confession was not credible.

This Court recognized that evidence bearing on the questions of voluntariness and credibility was not distinct and mutually exclusive. 476 U.S. at 687. The question of credibility was not settled merely because the trial judge made a pretrial ruling as to voluntariness. 476 U.S. at 688. By excluding such evidence, the

trial court deprived the defendant of a fair trial. 476 U.S. at 690.

In the instant case, a trial judge's previous determination that a witness's guilty plea was valid under Rule 11, Fed. R. Crim. P., has been characterized by the district court and the court below as a "legal" question. On that basis, crucial factual questions concerning the motivation of cooperating government witnesses and their understanding of the charges to which they pled guilty were declared off-limits for cross-examination and closing argument. As with the defendant's confession in Crane, two aspects are presented by the witnesses' guilty pleas in this case: a legal aspect concerning "validity" under Rule 11 and a factual

aspect addressing the witnesses' understanding of the charges and motivations for pleading guilty.

Based on Crane v. Kentucky, supra, Petitioner submits that the previous legal determination that a guilty plea is legally valid cannot substitute for the factual inquiry into a witness's decision to cooperate and testify for the government.[1] The opinion of the

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[1] Petitioner would point out that the Court's statement in Crane that one act or event may have both legal and factual aspects was adopted by a Court of Appeals in United States v. Barnes, 798 F.2d 283, 289 (8th Cir. 1986). In that case the court vacated a conviction wherein the defendant was prohibited at trial from questioning a government agent about his previous statements concerning certain tape recordings. The trial court had previously considered similar questions about the agent's statements in a pretrial motion to dismiss the indictment. Evidence relating to the

Ninth Circuit below conflicts with this Court's decision in Crane v. Kentucky. The Court should therefore grant the writ.

3. This Case Presents a Question that is Important to the Administration of Criminal Justice.

Traditionally, federal prosecutions involved offenses in which the required standards of mens rea and criminal intent were quite clear, e.g., bank robberies, theft of government property, counterfeiting, and the like. Even "white collar" crimes, such as tax evasion, had clear standards of criminal

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motion to dismiss was also important to the jury's assessment of the agent's credibility and should have been admitted at trial.

culpability imposed by federal statutes which required that the crimes be "knowingly" or "willfully" committed. See, e.g., United States v. Pomponio, 429 U.S. 10, 97 S.Ct. 22, 50 L.Ed.2d 12 (1976) (willfulness in a criminal tax case defined as intentional violation of a known legal duty).

More recently, it is fair to say that standards of culpability in criminal cases have become diluted. We are now in an era of "technical offenses" and strict liability caused inter alia by the complexities of federal regulations, including bank regulations. Convictions are now being based on "reckless" misconduct partially on the theory that "deliberate ignorance" may be equated with

knowledge. See, e.g., United States v. Jewell, 532 F.2d 697 (9th Cir.), cert. denied, 426 U.S. 951 (1976). In the case of currency transaction offenses, Courts of Appeal have held that a defendant may be convicted of willfully structuring currency transactions into amounts less than $10,000 even if he did not know he was violating the law in doing so. United States v. Hoyland, 903 F.2d 1288 (9th Cir. 1990); United States v. Scanio, 900 F.2d 485 (2nd Cir. 1990). Thus, "willfulness" in tax prosecutions (see Pomponio, supra) means something different from "willfulness" in money laundering cases.

The present case is but another example where the government is pressing criminal liability to the outer limit in

an effort to punish alleged savings and loan fraud. Petitioner was a customer of State Federal Bank. He relied upon the bank officers and its legal counsel to administer loan transactions to avoid violating the loan-to-one-borrower regulation.[2]

Much of the testimony in this case swirled around the question of whether the loan-to-one-borrower regulation had been violated. The court below, however, has previously held that violation of a federal banking regulation is not per se a criminal

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[2] At the time he sentenced Petitioner, the trial judge stated that he did "not believe that there was any intention that State Federal would lose any money as a result of your [Petitioner's] activities." See Transcript of Sentencing, July 24, 1989, p. 2.

offense. See United States v. Wolf, supra, 820 F.2d at 1505.

The loan-to-one-borrower regulation is lengthy and not easily understood.[3] The trial court below refused to admit the text of the regulation into evidence out of concern for confusing the jury. RT 1813. Petitioner was not an official of the bank. His defense was that he relied on principals of State Federal to administer loans properly and that, in

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[3] The regulation essentially states that no insured institution may make a loan to one borrower if the sum of that loan and all other loans to that borrower would exceed the lesser of ten percent of the institution's withdrawable accounts or the amount of the institution's net worth. A "borrower" includes nominees of the borrower, but the term "nominee" is not defined. See 12 C.F.R. § 563.9-3(a)(1) and (b)(1).

any event, he was not privy to the amount of the bank's withdrawable accounts or net worth as described in the regulation. See App. C.

Petitioner believes that in this case a misunderstanding of the relation between the loan-to-one-borrower regulation and the resulting criminal charges was part of the reason for the pleas entered by the three testifying co-conspirators. Prosecutions based on a complicated regulation such as the banking regulation in this case may indeed spawn guilty pleas which are as much a result of confusion as they are a deliberate decision to avoid further risk of prosecution. It is utterly unrealistic to deny that the target of a bank fraud investigation or a

defendant in a bank fraud prosecution may desire to plead guilty irrespective of whether he is in fact guilty. An individual need not even admit guilt in order for him to be adjudged guilty. North Carolina v. Alford, 400 U.S. 25, 91 S.Ct. 160, 27 L.Ed.2d 162 (1970).[4]

The court's willingness to accept guilty pleas based on violation of technical banking regulations must be tested at trial. When statutes are vague or complex, courts must be vigilant to prevent criminal convictions

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[4] The opinion below would prevent a defendant from questioning the guilt of a cooperating witness who entered an Alford plea and who continues to maintain his innocence. This would be patently unfair to the defendant even though the plea was "valid" under Alford. That situation differs from the instant case only by degree.

(including guilty pleas) from being based on unwitting conduct or a mistaken understanding of the law. See, e.g., United States v. Nofziger, 878 F.2d 442, 454 (D.C. Cir.). cert. denied, ___U.S.___, 110 S.Ct. 564 (1989) (Where criminal act may itself be benign, doer may not have knowledge of the circumstances that render his acts criminal. One cannot assume that doer will be alerted to consequences of such conduct.) See also United States v. Mallas, 762 F.2d 361 (4th Cir. 1985) (conviction relating to tax shelter program reversed because it was based on a point of law that was vague or highly debatable). In these situations, a conviction based upon guilty pleas must

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be subject to inquiry at a subsequent trial.

Defense counsel should have been allowed to explore the question of the witness' guilt on cross-examination and argue this issue before the jury. If the ruling of the court below is upheld, government prosecutors will continue to oppose legitimate questioning of guilty pleas, particularly in trials of regulatory cases such as this one, on the grounds that the "validity" of the plea is not open to question. That is not and should not be the law.

Given the trend toward criminalization of violations of essentially regulatory schemes and strict liability crimes, Petitioner respectfully suggests that the question

raised is one of exceptional importance. Accordingly, this Court should grant the writ.

CONCLUSION

For the reasons stated, the writ should be granted and the judgment of the Court of Appeals for the Ninth Circuit reversed.

DATED this seventh day of December, 1990.

Respectfully submitted,

NORMAN SEPENUK, P.C.

_____

Norman Sepenuk
Douglas Stringer
Of Attorneys for Petitioner

CERTIFICATE OF SERVICE

I hereby certify that I served the foregoing PETITION FOR A WRIT OF CERTIORARI on counsel for respondent by mailing three copies thereof to said counsel in a sealed envelope with postage paid, addressed to:

Solicitor General of the
United States
Department of Justice
Washington, D. C. 20530

and one copy addressed to:

Lance A. Caldwell
Assistant U. S. Attorney
312 United States Courthouse
620 S. W. Main Street
Portland, Oregon 97205

and deposited in the United States Post Office at Portland, Oregon, on said day. All parties required to be served have been served.

DATED this seventh day of December, 1990.

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Norman Sepenuk
Of Attorneys for Petitioner

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. BRIAN JOHN OLSVIK, Defendant-Appellant.	NO. 89-30238 DC NO. CR-88-131-PA MEMORANDUM*
UNITED STATES OF AMERICA, Plaintiff-Appellee, v. THOMAS EDWARD NEVIS, Defendant-Appellant.	89-30247 DC NO. CR-88-131-PA

Appeal from the United States District Court for the District of Oregon
Owen M. Panner, Chief Judge, Presiding

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* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

Argued and Submitted July 12, 1990
Portland, Oregon

BEFORE: FLETCHER, FERGUSON, and
FERNANDEZ, Circuit Judges.

After the collapse of State Federal Savings & Loan Association (State Federal), a savings and loan association of Corvallis, Oregon, an indictment was filed against Brian J. Olsvik, Thomas E. Nevis, Mitchell Brown, and others. They were charged with conspiracy to defraud the United States, the Federal Home Loan Bank Board (FHLB), and the Federal Savings & Loan Insurance Corporation (FSLIC), and with the commission of multiple substantive offenses arising out of that conspiracy.

Their illegal acts were alleged to have consisted of the use of false entries in the books of State Federal,

and other actions, all of which were designed to allow Nevis to obtain loans from State Federal which far exceeded the lending limits imposed upon that institution.

Olsvik and Nevis were found guilty of the conspiracy and of various of the substantive charges, and each appeals his conviction.

Olsvik claims that there was prejudicial error in the failure to admit certain deposition testimony of a deceased co-conspirator and that the evidence was not sufficient to convict him. We affirm his conviction.

Nevis also asserts that the evidence was insufficient to convict him and adds that his cross-examination and argument regarding a former co-conspirator, who pled guilty and

testified against him, was unduly restricted. He also claims that the text of a certain lending limit regulation should have been placed before the jury. We affirm his conviction.

BACKGROUND

We have outlined the background facts of this case in our opinion in United States v. Brown, No. 89-30292, slip op. ___ (9th Cir. ____ 1990), and will not repeat them here.

JURISDICTION AND STANDARD OF REVIEW

The district court had jurisdiction pursuant to 18 U.S.C. § 3231. We have jurisdiction pursuant to 28 U.S.C. § 1291.

We review evidentiary rulings for abuse of discretion. United States v. Bonallo, 858 F.2d 1427, 1435 (9th Cir.

1988); Bail Bonds by Marvin Nelson, Inc. v. Commissioner, 820 F.2d 1543, 1547 (9th Cir. 1987). This standard applies to rulings under Fed. R. Evid. 403. United States v. Layton, 855 F.2d 1388, 1402 (9th Cir. 1988), cert. denied, ___ U.S. ___, 109 S.Ct. 1178, 103 L.Ed. 2d 244 (1989).

If no proper motion for acquittal has been made, we review the evidence for plain error under Fed. R. Crim. P. 52(b). See United States v. Ramirez, 880 F.2d 236, 238 (9th Cir. 1989) (court has power to prevent miscarriage of justice).

We will determine that a trial court's comment has deprived a defendant of a fair trial if the defendant can show prejudice. United States v. Herbert, 698 F.2d 981, 984 (9th Cir.),

cert. denied, 464 U.S. 821, 104 S.Ct. 87, 78 L.Ed 2d 95 (1983).

We review de novo an alleged violation of the right to confrontation under the sixth amendment. United States v. Jenkins, 884 F.2d 433, 435 (4th Cir.), cert. denied, ___ U.S. ___, 110 S.Ct. 568, 107 L.Ed. 2d 562 (1989). Nevertheless, limitations on the scope of cross-examination are, basically, reviewed for abuse of discretion. United States v. McClintock, 748 F.2d 1278, 1289 (9th Cir. 1984), cert. denied, 474 U.S. 822, 106 S.Ct. 75, 88 L.Ed. 2d 61 (1985).

Finally, we review for abuse of discretion the district court's control of closing argument. United States v. Guess, 745 F.2d 1286, 1288 (9th Cir. 1984), cert. denied, 469 U.S. 1225, 105

S.Ct. 1219, 84 L.Ed. 2d 360 (1985).

DISCUSSION

A. THE OLSVIK APPEAL

1. Admission of Waters Deposition.

Prior to Olsvik's indictment, FSLIC had filed a civil action against Olsvik, Waters and others. Waters' deposition was taken, but by the time of the trial in this case he had died. Olsvik and the government sought to have portions of Waters' deposition admitted into evidence. The district court excluded those portions on the ground that Nevis objected to parts of them. Olsvik assigns that as error.

If the deposition were to be admitted at all, it would have to have been admitted under Fed. R. Evid. 804(b)(1) (former testimony) or

804(b)(5) (catchall). Olsvik's position raises some interesting issues which we have not previously decided, including whether FSLIC can be considered the predecessor in interest of the government in this case, and whether the predecessor in interest language of 804(b)(1) even applies when the proceeding at hand is a criminal case. However, it is not necessary or appropriate for us to decide those knotty issues at this time, because even if the evidence were otherwise admissible its exclusion was harmless.

It is true that Waters may have had every reason to be untruthful at his deposition, but his testimony could still have had some weight if admitted at trial. Still and all, the issues that Waters' deposition covered

were also covered by other evidence at trial. Those included the relationship among the various loans, what the loan to one borrower rule meant to him, reliance upon legal advice, and the handling of a certain loan in process account. Add to that the fact that, whatever Olsvik may now argue, admission of the Waters deposition would have been a mixed blessing at best,[1] and the ineluctable conclusion is that the error, if any, was harmless. See United States v. Karr, 742 F.2d 493, 496-97 (9th Cir. 1984); United States v. Barrett, 703 F.2d 1076, 1081-82 (9th Cir. 1983).

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[1] Among other things, much of the testimony consisted of statements of Waters that he did not know what had happened or could not recall what had happened.

2. Did the Evidence Support the Verdict?

Olsvik earnestly proclaims his innocence and argues that the evidence will not support the verdicts against him. However, he failed to make a motion for acquittal, so, as we stated above, we will review the record for plain error. We have done so.

We will not engage in a lengthy summary of the sordid details of this case. Suffice it to say that the evidence is strong, even overwhelming, and certainly supports the decision of the jury. Perhaps the ends of Waters and Olsvik were somewhat pure. The jury was not required to make that judgment. Neither are we. The evidence supports a determination that the means used to accomplish those ends were far from

pure. In light of the evidence before us, the verdict must stand.

B. THE NEVIS APPEAL

1. Attack on Guilty Pleas.

Jack Franks, one of the indicted co-conspirators, testified for the government at trial.[2] Nevis, of course, sought to impeach Franks by attacking his motives and by attempting to demonstrate bias. The district court gave Nevis free rein so to do. However, Nevis also wished to suggest to Franks and to the jury that the guilty plea was actually invalid. At that point, the court intervened, and properly so.

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[2] Two other co-conspirators, Ronald Koos and Ronald Campbell, similarly testified. Certain of Nevis' arguments as to Franks apply to them. While we will not discuss them separately, what we say as to Franks also applies to them.

It is undoubtedly true that defendants should be permitted to confront and cross-examine witnesses against them. It is also true that trial judges retain the power to impose restrictions upon that cross-examination, and have wide latitude to preclude "harassment, prejudice, confusion of the issues. . .or interrogation that is repetitive or only marginally relevant." Delaware v. Van Arsdall, 475 U.S. 673, 679, 106 S.Ct. 1431, 1435, 89 L.Ed. 2d 674 (1986). After all, what the constitution guarantees is "an opportunity for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish." Id.

The narrow restriction imposed

upon Nevis in this case comes well within those parameters. The district court did not attempt to shield a witness from examination or try to bolster his credibility. Cf. United States v. Allsup, 566 F.2d 68, 72-73 (9th Cir. 1977); United States v. Mayer, 556 F.2d 245 (5th Cir. 1977); United States v. Marion, 477 F.2d 330 (6th Cir. 1973). Here all the court did was preclude Nevis from raising before the jury the purely legal issue of whether Franks' actual guilty plea was valid. See United States v. Poschwatta, 829 F.2d 1477, 1483 (9th Cir. 1987), cert. denied, 484 U.S. 1064, 108 S.Ct. 1024, 98 L.Ed. 2d 989 (1988). The fact that a witness should or should not have pled guilty is outside the point, and certainly did not tend to impeach that

witness' testimony at trial. Even if one can spin some gossamer net that will pull the issue into focus, it would be so marginally relevant as to be properly excluded.

By the same token, the court's precluding Nevis from arguing his invalid guilty plea theory to the jury was no error at all.

Nevis, however, claims that he suffered great prejudice when, under the lash of repeated attempts to go into this improper matter, the court said, "I think it's not relevant to this case in any event. . . .I took the plea. It was a valid plea. . . ." Just so. The validity of the plea itself was outside the point in this case, and if counsel was insistent on going into its validity, that was a legal matter and he

got a ruling on the law. Beyond that, the comment was fleeting, unemphasized, and unrepeated. It was in no way similar to the situation which moved the court to reverse in United States v. Marion, 477 F.2d 330 (6th Cir. 1973). There was no long harangue of the jury, no rehabilitation of the witness, and no tendency to mislead or prejudice the jury. Finally, the court told the jury to treat the statements of witnesses of Franks' ilk with great caution and warned it not to consider anything the court said or did as an indication of what the verdict should be.

2. Refusal to Admit Text of Regulation.

Here, as in Brown's trial, there were references to the loan to one borrower regulation--12 CFR § 563.9-3

(1985) (recodified at 12 C.F.R. § 563.93 (1990)). What we have said in Brown, slip op. ___, ___ applies here, too.

We repeat, however, that we recognize that use of the regulation is not entirely without danger. The district court properly took that into account when it determined that the regulation itself should not be admitted into evidence. Admission may well have unduly emphasized the language of the regulation and diverted the jury from its proper task. The issue was not the regulation as such, it was the falsification of records and diversion of funds. We cannot say that the district court abused its discretion when it made this ruling.

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3. Did the Evidence Support the Verdict?

Nevis, too, claims that the evidence will not support the verdict against him. He, too, failed to make a proper motion for acquittal. He, too, makes his claim in the face of a record which contains ample evidence to sustain a conviction. His conviction must also be upheld.

CONCLUSION

In the course of the complex trial of this case, the district court avoided making any errors of substance, and the evidence was sufficient to establish a conspiracy and numerous substantive offenses all to the detriment of State Federal, FSLIC, and FHLB.

AFFIRMED.

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. BRIAN JOHN OLSVIK, Defendant-Appellant.	NO. 89-30238 DC NO. CR-88-131-PA ORDER DENYING PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC
UNITED STATES OF AMERICA, Plaintiff-Appellee, v. THOMAS EDWARD NEVIS, Defendant-Appellant.	NO. 89-30247 DC NO. CR-88-131-PA F I L E D OCT 19, 1990 Clerk, U.S. Court of Appeals

BEFORE: FLETCHER, FERGUSON, and FERNANDEZ, Circuit Judges.

The panel has unanimously voted to deny the petitions of Brian John Olsvik

and Thomas Edward Nevis for rehearing. The suggestions, by each of them for rehearing en banc were circulated to the active judges of the court, and no judge requested a vote for en banc consideration. The petitions for rehearing and the suggestions for rehearing en banc are accordingly denied.

APPENDIX C

C-1

CODE OF FEDERAL REGULATIONS

CHAPTER 12

Banks and Banking

§ 563.9-3 Loans to one borrower.

(a) Definitions used in this section -- (1) One borrower. (i) The term "one borrower" means:

(a) Any person or entity that is, or that upon the making of a loan will become, obligor on a loan;

(b) Nominees of such obligor;

(c) All persons, trusts, syndicates, partnerships, and corporations of which such obligator is a nominee, a beneficiary, a member, a general partner, a limited partner owning an interest of ten percent or more (based on the value of his contribution), or a record or beneficial

stockholder owning ten percent or more of the capital stock;

* * *

(b) Limitations -- (1) Aggregate loans. No insured institution shall make any loan to one borrower if the sum of (i) the amount of such loan and (ii) the total balances of all outstanding loans owed to such institution and its service corporation affiliates by such borrower exceeds an amount equal to ten percent of such institution's withdrawable accounts or an amount equal to such institution's net worth, whichever amount is less. . . .

* * *

No. 90-1011 (2)

In the Supreme Court of the United States

OCTOBER TERM, 1990

THOMAS EDWARD NEVIS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the district court violated petitioner's rights under the Confrontation Clause of the Sixth Amendment by prohibiting cross-examination of a government witness regarding the legal sufficiency of his guilty plea.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. A1-A17) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on August 21, 1990 (Pet. App. B1-B2). A petition for rehearing was denied on October 19, 1990. The petition for a writ of certiorari was filed on December 19, 1990. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

After a jury trial in the United States District Court for the District of Oregon, petitioner was convicted of con-

spiring to defraud the United States, in violation of 18 U.S.C. 371 (Count 1); wire fraud, in violation of 18 U.S.C. 1343 (Counts 2, 4, 14-19); making false statements, in violation of 18 U.S.C. 1014 (Counts 9, 21, 25); misapplying bank funds, in violation of 18 U.S.C. 657 (Counts 10, 12, 28); bank fraud, in violation of 18 U.S.C. 1344 (Counts 26, 27, 31-33); and making false entries, in violation of 18 U.S.C. 1006 (Counts 29, 34-36). He was sentenced to two years' imprisonment and five years' probation, and he was ordered to pay restitution in the amount of $2 million dollars. The court of appeals affirmed. Pet. App. A1-A17.

1. The evidence is summarized in the companion case of *United States* v. *Brown*, 912 F.2d 1040, 1041 (9th Cir. 1990). Pet. App. A4. When State Federal Savings & Loan Association in Corvallis, Oregon, ran into financial difficulty, President Larry Waters and Vice President Brian Olsvik began an aggressive loan campaign to generate additional fee income for the bank. Petitioner was a businessman and a real estate developer who had a number of loans with State Federal at the time. Waters and Olsvik decided that their loan program would be enhanced by making additional loans to petitioner. However, State Federal was subject to a "loans to one borrower" regulation that limited the amount that could be loaned to any one person.[1] Petitioner had reached that limit.

From early 1984 through early 1985, Waters, Olsvik, and petitioner engaged in a series of maneuvers designed to conceal the fact that petitioner was the actual borrower of certain funds. This concealment was accomplished by the use of various nominees, and through schemes that directed the loan proceeds from one person to another. As a result of those maneuvers, the records of State Federal concealed the actual facts from State Federal itself, its regulators, and the

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[1] 12 C.F.R. 563.9-3 (1985) (recodified at 12 C.F.R. 563.93 (1990)).

Federal Savings and Loan Insurance Corporation. See *United States* v. *Brown*, 912 F.2d at 1041.

2. Indicted co-conspirator Jack Franks, who assisted petitioner in obtaining loans from State Federal, testified for the government at petitioner's trial. Counsel for petitioner sought to impeach Franks by attacking his motives and by attempting to demonstrate bias. Counsel explored the terms of Franks' plea agreement, which itself was introduced into evidence. Counsel elicited that Franks had pleaded guilty to devising a scheme to defraud State Federal and to obtain money by means of false representations. Counsel further elicited Franks' acknowledgement that, in return for the plea, the government agreed to dismiss 13 other counts in which Franks was charged, to dismiss the two counts of the indictment that had been brought against Franks' wife, to advise the sentencing court of Franks' cooperation, and to take no position on sentencing. Franks testified that, as part of the plea agreement, the government also allowed him to plead guilty in the District of Oregon to a bank fraud charge brought in the Northern District of Texas. Tr. 633-636, 642. Defense counsel further elicited that, before Franks was indicted, he did not think that he was committing any crimes, and that he did not intend to defraud State Federal. Tr. 636-637.[2]

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[2] Similarly, during cross-examination of government witnesses and co-conspirators Ronald Koos and Ronald Campbell, defense counsel fully explored the terms of their plea agreements with the government and their reasons for testifying. Tr. 258-264, 721-722, 724-725, 733-734. Defense counsel elicited from Koos that he had not believed at the time in question that he was doing anything illegal, and that the reason he had pleaded guilty was "to minimize [his] risk and get it over with," and "[to] balanc[e] the risk involved in going ahead with the case" (Tr. 253, 262, 264). Defense counsel elicited from Campbell that, at the time in question, he "[was not] intending to conspire with people to commit crimes against State Federal or the FSLIC" (Tr. 732).

In addition to eliciting the benefits Franks had obtained as a result of his guilty plea, defense counsel attempted to establish that Franks was not actually guilty of the offense to which he had pleaded guilty. Defense counsel elicited from Franks that Franks had pleaded guilty because he thought that the violation of the "loans to one borrower" rule was a criminal offense. When defense counsel stated that a violation of that rule is not a criminal offense, Franks responded: "Well, I feel maybe I shouldn't be here." Tr. 633. Franks further admitted that in a statement he had made in conjunction with his guilty plea, he had declared that "[i]t is my understanding that because [petitioner and his wife] were at their limit in borrowing capacity at [State Federal], that this is a violation of the law, and I have pleaded guilty to that offense." Tr. 634-635. In response to that testimony, defense counsel remarked: "Well, again, what you pleaded guilty to, Mr. Franks, is not a crime." Tr. 635.

On re-cross examination of Franks, defense counsel continued to suggest to Franks and to the jury that Franks' guilty plea to the State Federal charge was legally invalid. Tr. 655. The government objected on the ground that defense counsel was misleading the jury by "not referring to the entire record made at the time [Franks'] plea was entered." *Ibid.* The trial court sustained that objection, stating: "I think it's not relevant to this case in any event as to what he pleaded to. I took the plea. It was a valid plea, and that's the end of that. Now let's go on." *Ibid.*

Shortly thereafter, defense counsel moved for a mistrial on the ground that petitioner had been denied his right to confront witnesses against him. The court denied the motion, stating (Tr. 674-677):

> I permitted counsel to go into that very extensively until I felt it had gone too far. I felt that counsel unintentionally was misrepresenting a little bit the nature of

> the plea. The complications of this case don't allow a simple statement of what the nature of the plea was. I think, also, it was entirely appropriate for me to say that the plea was appropriate and that's particularly true after I had listened to this defendant describe the gyrations that went on.
>
> * * * I'm not going to preclude you from arguing that within reasonable limits, but I will stop you if there is an indication that the plea was improper or that the man was not guilty when he entered the plea. I did not permit that.
>
> * * * * *
>
> * * * The only time I stopped you was after you began to suggest that the plea was an invalid plea and the man should not have pleaded guilty. I'm not going to permit that. I will permit you to put the plea agreements in evidence, I will permit you to argue as to their conduct, but when you suggest that the plea was inappropriate and this man shouldn't be here * * * [a]nd when you made the statements about such as, for example, "Well, maybe you shouldn't be here," those kind [*sic*] of comments are inappropriate.

3. The court of appeals affirmed petitioner's convictions. Pet. App. A1-A17. The court rejected petitioner's contention that the restriction on petitioner's cross-examination of Franks denied petitioner his Sixth Amendment right to confront the witnesses against him. The court found that the district court had given petitioner free rein to attack Franks' motives and to attempt to demonstrate bias, and that it had not attempted to shield Franks from examination or to bolster his credibility. Pet. App. A11, A13. All the district court had done was to preclude petitioner "from raising before the jury the purely legal issue of whether Franks' actual guilty plea was valid." *Id.* at A13. The court

of appeals upheld this "narrow restriction" (*id.* at A12) on petitioner's right of cross-examination, explaining:

> The fact that a witness should or should not have pled guilty is outside the point, and certainly did not tend to impeach that witness' testimony at trial. Even if one can spin some gossamer net that will pull the issue into focus, it would be so marginally relevant as to be properly excluded.

Id. at A13-A14.

The court also rejected petitioner's claim that he suffered substantial prejudice when the district court judge commented that he had taken Franks' plea and that it was a valid plea:

> The validity of the plea itself was outside the point in this case, and if counsel was insistent on going into its validity, that was a legal matter and he got a ruling on the law. Beyond that, the comment was fleeting, unemphasized, and unrepeated.

Pet. App. A14-A15.

ARGUMENT

Petitioner renews his contention (Pet. 9-27) that the district court violated the Sixth Amendment by refusing to permit cross-examination of Franks regarding the validity of his guilty plea. The court of appeals properly rejected that contention.

1. The Confrontation Clause of the Sixth Amendment guarantees a defendant in a criminal case the right "to be confronted with the witnesses against him." That right entitles a defendant on cross-examination to probe the witness's motivation for testifying against the defendant. *Davis* v. *Alaska*, 415 U.S. 308, 316-317 (1974). But it does not entitle a defendant to conduct unlimited cross-

examination. *Delaware* v. *Van Arsdall*, 475 U.S. 673, 679 (1986); *Delaware* v. *Fensterer*, 474 U.S. 15, 20 (1985). Instead, "trial judges retain wide latitude insofar as the Confrontation Clause is concerned to impose reasonable limits on such cross-examination based on concerns about, among other things, harassment, prejudice, confusion of the issues, the witness' safety, or interrogation that is repetitive or only marginally relevant." *Van Arsdall*, 475 U.S. at 679.

Here, the district court acted well within its discretion. The court imposed only a minor limitation on petitioner's ability to impeach Franks through inquiry into collateral matters. As the court of appeals noted (Pet. App. A11), the district court gave petitioner free rein to impeach Franks by attacking his motives and by attempting to demonstrate bias. That cross-examination and other evidence at trial fully illuminated Franks' motivation for testifying against petitioner. In addition, counsel for petitioner established that Franks believed that it was a crime to violate the federal lending limit regulation. The court stopped petitioner's counsel only when he sought to go even further afield by attempting to suggest that Franks' guilty plea was invalid. *Id.* at A12-A13. The purely legal issue of the validity of Franks' guilty plea was irrelevant to petitioner's culpability. See, *e.g.*, *Bridge* v. *Lynaugh*, 838 F.2d 770, 773 (5th Cir. 1988) (a co-defendant's conviction and sentence for an offense arising out of the same course of events is irrelevant to the question of the defendant's guilt).

Further cross-examination of Franks on that question would have accomplished nothing other than to mislead and confuse the jury. Despite defense counsel's attempts to suggest otherwise, Franks' guilty plea was legally valid. Franks pleaded guilty to Count 32 of the indictment, which charged that he and others "did devise a Scheme to defraud State Federal, examiners of the FHLB, and the FSLIC, and to obtain money, in the custody and control of State Federal,

by means of false and fraudulent pretenses, representations, and promises." C.A. Excerpt of Record 35. That count alleged that petitioner and others had caused State Federal to make a $2 million loan for the purported purpose of enabling petitioner's wife to buy an apartment complex. *Ibid.* The count further alleged that petitioner and others made the following misrepresentations to State Federal to secure the loan:

> a. that [the corporation formed to secure the loan], with [petitioner's wife] as authorized signator, was the true borrower, well knowing that [the corporation and petitioner's wife] were acting as a nominee for [petitioner] and Franks.
>
> b. that the loan proceeds were for acquisition of an apartment complex, well knowing that approximately $400,000 from the loan proceeds were diverted to Nevis Industries and to pay other [of petitioner's] loans.

C.A. Excerpt of Record 35-36.

On redirect examination, Franks testified that, when the proposal for the apartment complex loan was presented to State Federal, he knew that State Federal records would reflect petitioner's wife to be the owner of the complex. Tr. 653. Franks also knew the proposal was false in that respect, since petitioner in fact owned 75% of the complex. Tr. 653. Franks knew, as well, that the records would be false or incomplete in failing to reflect that a portion of the loan proceeds were to be used for purchase of a different property and for petitioner's personal use. Tr. 653. Finally, Franks admitted that his knowledge of the falsity of the representations made to State Federal formed the basis for his guilty plea. Tr. 654.

As the district court explained when defense counsel argued that Franks' plea was invalid because Franks did not

intend to defraud the United States (Tr. 855):

> [I]t's also a crime to attempt to execute or to execute a scheme or artifice to obtain any of the assets of the bank by means of a false or fraudulent pretense or statement.
>
> It is not necessary that * * * a person intend to cheat the United States government in order to be guilty of that offense, nor is it necessary that they intend a criminal act if they intend to devise a scheme to defraud a bank or to obtain any of the assets by false means.

Finally, the narrow limitation on petitioner's right of cross-examination did not prejudice petitioner. The court made clear to the jury that a violation of the lending limit regulation was not a criminal offense (Tr. 2060-2061):

> During the trial you've heard testimony concerning the federal lending limits rule. Whether or not defendants may have violated the federal lending rule is not sufficient to establish the crimes alleged in the indictment.
>
> The issue in this case is whether the defendants are guilty of violating certain federal criminal statutes. The issue is not whether any federal civil laws, such as the federal lending limit, were violated, nor whether the defendants were involved in any such violations, if they occurred. The testimony which you've heard about the federal lending limit rule may be considered only because it may be necessary to your understanding of the reasons or motives for the various loan transactions.

2. Petitioner's contention (Pet. 9-13) that the decision below conflicts with *United States* v. *Mayer*, 556 F.2d 245 (5th Cir. 1977), and *United States* v. *Marion*, 477 F.2d 330 (6th Cir. 1973), is without merit. The facts of *Mayer* and *Marion* bear no resemblance to the facts of the present case.

In *Mayer*, the trial court precluded cross-examination into either the motives of government witnesses for pleading guilty or the terms of their plea agreements. The trial court in *Mayer* instructed the jury that as a matter of law the pleas of the government witnesses had been entered voluntarily and without any expectation of judicial or prosecutorial lenience. Similarly, in *Marion*, the trial court curtailed questioning regarding any deals that the witness might have made with the government. In *Marion*, the trial judge told the jury he credited the cooperating witness's statement that no arrangement or deal with the government had induced him to testify. Here, by contrast, as the court of appeals properly found, "[t]he district court did not attempt to shield a witness from examination or try to bolster his credibility," but merely "preclude[d] [petitioner] from raising before the jury the purely legal issue of whether Franks' actual guilty plea was valid." Pet. App. A13.

Nor does the decision below conflict with this Court's decision in *Crane* v. *Kentucky*, 476 U.S. 683 (1986), as petitioner claims (Pet. 14-18). In *Crane*, the trial court denied the defendant's pretrial motion to suppress his confession, finding that it was voluntary. At trial, the court excluded all testimony concerning the circumstances of the defendant's confession on the ground that the testimony pertained solely to the legal issue of voluntariness and was therefore inadmissible. This Court reversed, holding that the exclusion of the testimony concerning the circumstances of the confession violated the defendant's Sixth Amendment right to confront witnesses against him. The Court concluded that, because evidence of the circumstances under which a confession is made bears on its credibility and its voluntariness, the defendant had been deprived of his right to show that the confession was "insufficiently corroborated or otherwise . . . unworthy of belief." 476 U.S. at 689 (quoting *Lego* v. *Twomey*, 404 U.S. 477, 485-486 (1972)).

Here, by contrast, the district court did not foreclose inquiry into the details of Franks' plea agreement with the government, or the circumstances surrounding his decision to plead guilty. The court merely, and properly, limited inquiry into the legal sufficiency of Franks' plea.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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(3)

No. 90-1011

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1990

THOMAS EDWARD NEVIS, Petitioner,

v.

UNITED STATES OF AMERICA, Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PETITIONER'S REPLY TO BRIEF FOR THE UNITED STATES IN OPPOSITION

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TO THE UNITED STATES COURT OF APPEALS
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PETITIONER'S REPLY TO BRIEF FOR THE UNITED STATES IN OPPOSITION

INTRODUCTION

Petitioner was tried and convicted in the District of Oregon of various offenses arising out of his relationship as a borrower from State Federal Savings and Loan ("State Federal"), a Corvallis, Oregon, savings and loan institution. Petitioner's conviction was in large

part based on the testimony of three alleged co-conspirators (Franks, Koos, and Campbell) who pled guilty to some of the very crimes with which Petitioner was charged.

The numerous advantages to these witnesses of pleading guilty and cooperating are described in the Petition at 4-5 and in the government's Brief at 3. The degree of understanding (or misunderstanding) Messrs. Franks and Koos possessed as to the charges to which they pled guilty is addressed in the Petition at 6-8 and in the government's Brief at 3-4.

Petitioner sought to show through cross-examination and to argue in closing argument that, in fact, these witnesses were not actually guilty of the crimes to which they pled guilty.

Petitioner sought to demonstrate that these witnesses pled guilty out of a mistaken understanding of how the law applied to their conduct or out of an overwhelming desire to obtain the advantages of a plea agreement.

The trial court at first permitted such cross-examination but then abruptly prohibited these inquiries at a crucial point in recross-examination by stating in the presence of the jury that Mr. Franks' plea was a "valid plea, and that's the end of that." TR 655. This suggested, of course, that Mr. Franks was in fact guilty of the charge to which he pled guilty. The district court subsequently compounded the harm by prohibiting defense counsel from any closing argument that would suggest that

//

Mr. Franks "was not guilty when he entered the plea." TR 675.

ARGUMENT

1. The district court's ruling was affirmed by the Court of Appeals on the theory that Petitioner intended to pursue a purely "legal issue." The government now echoes that view, characterizing the "Question Presented" as whether Petitioner may challenge the "legal sufficiency" of another person's guilty plea. The question of the legal sufficiency of the guilty pleas is beside the point. Rule 11, Fed. R. Crim. P., governs the acceptance of guilty pleas by a district judge. The "legal sufficiency" of Mr. Franks' guilty plea depends on whether Rule 11 was observed when he pled guilty. See McCarthy v. United States, 394 U.S. 459,

89 S.Ct. 1166, 22 L.Ed.2d 418 (1969). Petitioner had no interest in questioning the legal sufficiency of guilty pleas. Petitioner's interest was in showing that his alleged accomplices were not guilty of the offenses to which they pled guilty. One cannot necessarily interpret a legally sufficient guilty plea as meaning that the individual in fact committed the crime. A person may enter a valid and otherwise legally sufficient guilty plea while continuing to maintain his innocence. North Carolina v. Alford, 400 U.S. 25, 91 S.Ct. 160, 27 L.Ed.2d 162 (1970).

2. The "legal sufficiency" tack adopted by the government also enables it to declare the subject of guilty pleas off limits as the exclusive

province of the judge--with no relevance to the jury's function. There is no question that a district court's own judgment about the legal sufficiency of a proffered guilty plea is at that time a legal issue. However, a guilty plea does not foreclose subsequent examination by a co-defendant of the factual basis of the plea. Indeed, the Fifth Circuit has held that a judge's determination made in accepting a guilty plea "does not have collateral estoppel effect" in a subsequent criminal proceeding. United States v. Mayer, 556 F.2d 245, 251 (5th Cir. 1977).

The government erroneously suggests that Mayer, supra, and United States v. Marion, 477 F.2d 330 (6th Cir. 1973), bear no resemblance to this case. The fact is that in those cases (as well

as in this case) the trial court prohibited inquiry into the circumstances of guilty pleas of government witnesses because the same judge had accepted the guilty pleas and formed his own judgments about the pleas. Those judgments were imposed on the jury as a substitute for cross-examination. In Mayer and Marion, however, the trial court was reversed for having improperly limited cross-examination; whereas in this case the trial court's ruling was affirmed on the grounds that guilty pleas are a legal issue beyond the realm of the trial jury. That is a square conflict.

This Court has recognized that an issue that is legal in one context may be factual in another and that a trial jury may therefore have occasion

to revisit a judge's legal findings for a different purpose. In Crane v. Kentucky, 476 U.S. 683, 106 S.Ct. 2142, 90 L.Ed.2d 636 (1986), this Court held that the circumstances surrounding the taking of a confession could be explored during a trial as bearing on the credibility of the confession, notwithstanding a previous legal finding by the court that the confession was voluntarily given. "[T]he circumstances surrounding the taking of a confession can be highly relevant to two separate inquiries, one legal and one factual." 476 U.S. at 688, 106 S.Ct. at 2145. The same is certainly true of the circumstances surrounding the taking of a guilty plea. The mere fact that a guilty plea at one time has a legal aspect does not strip it of factual

relevance in a later proceeding. We respectfully submit that the Court of Appeals below overlooked this important principle expressed in Crane v. Kentucky when it decided Petitioner's case.

3. By its citation to Bridge v. Lynaugh, 838 F.2d 770 (5th Cir. 1988), a case inapposite here, the government suggests that these guilty pleas were irrelevant to the question of Petitioner's guilt. Br.Resp. at 7. We point out that the government did not take that approach at trial.

At the trial, the government put these three guilty pleas into evidence during the direct examination of each of its respective witnesses. The government used Petitioner's association with the accomplices/ witnesses to tie him to the scheme and

conspiracy shown by those guilty pleas. The Court need only look to the closing argument of government counsel to assess the impact of this tactic. "And if Mr. Franks [the primary government witness] is a crook, well, you lay down with dogs, and you get fleas, ladies and gentlemen." RT 2019.

No one can seriously doubt the benefit to the government and attendant damage to Petitioner of the fact that guilty pleas of accomplices were in evidence. Petitioner sought to explore in cross-examination, and argue in closing argument if supported by the evidence, that these witnesses simply were not guilty of the offenses to which they pled guilty. The trial court improperly took this question from the jury.

4. If in pleading guilty one is to admit all the elements of a formal charge, he must possess "an understanding of the law in relation to the facts." McCarthy v. United States, 394 U.S. 459, 466, 89 S.Ct. 1166, 1171, 22 L.Ed.2d 418 (1969) (footnote omitted). The record establishes quite persuasively that Mr. Franks possessed little if any understanding of the law in relation to the facts when he pled guilty. Mr. Koos, on the other hand, pled guilty after "balancing the risk involved in going ahead with the case." RT 264.

This Court has observed that "[R]easons other than the fact that he is guilty may induce a defendant to so plead. . . ." North Carolina v. Alford, supra, 400 U.S. at 33, 91 S.Ct. at 165,

quoting, State v. Kaufman, 51 Iowa 578, 580, 2 N.W. 275, 276 (1879). This candid assessment was never more apt than in this case, and yet neither the government nor the two courts below have articulated a reason why Petitioner could not simply suggest as much to the jury.

5. The possibility that the factual basis required of a guilty plea can be "smoothed over" or even misrepresented by an individual anxious to plead guilty is greatest in complex prosecutions, as here, involving confusing banking regulations such as the loan-to-one-borrower rule. The government's eagerness to obtain a plea agreement to strengthen its case and a district court's willingness to accept a guilty plea under these circumstances

must be subject to scrutiny by a criminal defendant against whom that guilty plea is used. Therein lies the importance of this question to the administration of criminal justice.

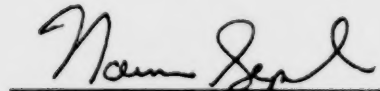
CONCLUSION

For the reasons stated, the Writ should be granted and the Judgment of the Court of Appeals for the Ninth Circuit reversed.

DATED this 12th day of April, 1991.

Respectfully submitted,

NORMAN SEPENUK, P.C.



Norman Sepenuk
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Attorneys for Petitioner

CERTIFICATE OF SERVICE

I hereby certify that I served the foregoing PETITIONER'S REPLY TO BRIEF FOR THE UNITED STATES IN OPPOSITION on counsel for respondent by mailing three copies thereof to said counsel in a sealed envelope with postage paid, addressed to:

Kenneth W. Starr
Solicitor General of the
United States
Department of Justice
Washington, D. C. 20530

and one copy addressed to:

Lance A. Caldwell
Assistant U. S. Attorney
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888 S. W. Fifth Avenue
Portland, Oregon 97204

and deposited in the United States Post Office at Portland, Oregon, on said day. All parties required to be served have been served.

DATED this 15th day of April, 1991.

Norman Sepenuk
Of Attorneys for Petitioner